



POLICE DEPARTMENT

November 23, 2010

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Lawrence Fiorello
Tax Registry No. 915719
Narcotics Borough Queens
Disciplinary Case No. 83884/08

The above-named member of the Department appeared before the Court on April 21, 2010, and July 27, 2010, charged with the following:

1. Said Sergeant Lawrence Fiorello, assigned to Patrol Borough Queens North Anti-Crime Unit, while on-duty on or about 2230 hours on October 11, 2006, having custody of a person arrested for driving without the proper documentation, did wrongfully and without just cause, authorize a strip-search of said person while in the confines of the 115 Precinct.

P.G. 208-05, Page 2, Paragraph 1C(1) – ARREST – GENERAL SEARCH GUIDELINES

The Department was represented by Mary Lynne Frey, Esq., Department Advocate's Office, and the Respondent was represented by John D'Alessandro, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Michael Gialouris as its witness.

Michael Gialouris

Gialouris was employed as a window cleaner. In October 2006, he was a student at LaGuardia Community College. At approximately 10:00 p.m. on October 11, 2006, Gialouris was driving home from class when he was approached by the police at a red light. A police officer, Fitterman, approached Gialouris' car and asked for his license and registration. Although Fitterman was not in uniform or displaying his shield, Gialouris realized he was an officer because there was a taxi behind him with a red turret light. When Gialouris checked his pockets, he realized that he did not have his license on him. When he informed Fitterman of this fact, Fitterman brought him to the rear of the car.

Fitterman patted down Gialouris' socks, shoes, ankles, and "private areas." According to Gialouris, he was searched three more times before being brought to the station house. In total, Fitterman spent approximately 23 minutes frisking and searching Gialouris. During the third of the searches, Fitterman removed money, cigarettes, and perhaps a lighter from Gialouris' pockets. Gialouris had \$3,000 on him at the time because his mother had given him money to buy a computer. Part of the money was a tuition refund from LaGuardia after Gialouris had received a Pell grant. It was also during this search that Fitterman opened Gialouris' belt and jeans, pulled the band of his underwear forward three or four inches, and looked inside his underwear.

Gialouris testified that a female officer named Cabrera was watching while Fitterman

pulled back the band of his underwear, so Gialouris pulled away. This was the only movement he made during the search. According to Gialouris, at no point did he thrust out the area between his waist and upper thigh. Nor did he rub that part of his body against the car. While being searched, Gialouris asked Fitterman to show his shield and also asked why he had been stopped in the first place. Fitterman did not answer these questions, but he repeatedly instructed Gialouris to "tell [him] where the stuff is." While Fitterman searched Gialouris, the Respondent searched his car. Gialouris did not have any interaction with the Respondent.

The Respondent drove Gialouris' car to the station house, and Fitterman and Cabrera transported Gialouris to the station house in a Department vehicle. Upon their arrival, Fitterman searched the back of the car to see if Gialouris hid anything there. As Fitterman led Gialouris inside, Fitterman asked two uniformed officers to walk with them to the cell area. Once there, Fitterman instructed Gialouris to take off his clothes. Gialouris asked to speak with a supervisor, but one of the police officers told him that everybody who gets arrested in that precinct gets strip-searched. Fitterman told him that if he did not comply, a doctor would have to perform the search. At Fitterman's direction, Gialouris took off his clothes, bent over, and spread his buttocks. At no point did any of the officers come into physical contact with Gialouris.

After getting dressed, Gialouris was placed inside a cell. The incident took place on a Wednesday night, but he was not arraigned until Friday afternoon, October 13, 2006. The case was ultimately resolved with Gialouris pleading guilty to not having his paperwork in order. Because of his time in police custody, Gialouris missed a final exam and was unable to complete the class.

Gialouris admitted that he had been arrested in March 2005 for possession of cocaine and marijuana. As a result of this previous arrest, he attended a drug treatment program. For thirteen

months he had to submit to drug testing, and October 13, 2006, would have been his last scheduled appointment. He was unable to complete the program because of the new case, but once he pleaded guilty to not having the correct paperwork, he received a certificate of completion from the court on the drug case.

On cross-examination, Gialouris stated that he was not searched or frisked in front of the precinct desk.

Upon questioning by the Court, Gialouris stated that the first time Fitterman touched his private area he just patted it. The second time, though, Fitterman held and cuffed his testicles.

The Respondent's Case

The Respondent testified in his own behalf. He also called Police Officer Jeffrey Fitterman and Police Officer Francis Diliberto, Jr. as witnesses.

The Respondent

The Respondent, a 15-year member of the Department, was assigned to Narcotics Borough Queens. Before being promoted to sergeant, he worked in the 73 Precinct Street Narcotics Enforcement Unit (SNEU). He was taught in Department training that the most common areas for suspects to hide weapons or contraband are the waistband, "groin area" and "the rear."

The Respondent testified that on October 11, 2006, he was performing plainclothes patrol in a taxi. He was working with Fitterman and Cabrera. Fitterman was driving 20 to 25 miles per hour on Roosevelt Avenue when Gialouris passed them on the left side, entered oncoming traffic, then cut in front of the taxi. The officers stopped Gialouris' car, and Fitterman asked

Gialouris to get out of the car upon learning that Gialouris did not have his license or registration.

As Fitterman patted down Gialouris at the rear of the car, the Respondent observed Gialouris lunge his groin area against the vehicle. The Respondent took this movement to mean that Gialouris was trying to prevent Fitterman from touching that part of his body. This led the Respondent to believe that Gialouris was trying to hide a weapon or contraband. The Respondent noted that the stop took place in a neighborhood "with a lot of drug activity." Gialouris also had \$3,000 in small denominations in his pocket.

Gialouris was handcuffed and transported in the taxi to the 115 Precinct station house. The Respondent followed. When the Respondent arrived at the command, he learned that Gialouris had been fidgeting around in the taxi and that several of Gialouris' personal items were found in the back seat of the car. To the Respondent, this supported his belief that Gialouris was trying to hide something.

The Respondent testified that it was mandatory Department policy that prisoners be searched again in front of the desk. While this policy was strictly enforced at the 115 Precinct, there was no policy that all prisoners be strip-searched. Of the 1,500 to 2,000 arrests that the Respondent had supervised, only 40 to 50 of them resulted in strip searches.

The Respondent observed Fitterman search Gialouris at the desk. According to the Respondent, Gialouris again moved away whenever Fitterman attempted to touch his waistband and groin area. Thus, the Respondent directed Fitterman to take Gialouris into the cell area for a strip search. The Respondent supervised the strip search and recorded it in the Command Log.

The Respondent explained that he ordered the strip search of Gialouris because he believed that Gialouris was hiding something that could hurt himself, a police officer, or

somebody else.

On cross-examination, the Respondent testified that during a regular search, a police officer is permitted to glide his hand around a prisoner's groin area and reach into his pockets. The Respondent did not observe any type of bulge in Gialouris' front pockets. Except for the movements that he made while being searched, Gialouris was compliant and followed orders. He neither screamed nor gave the impression that he was a violent person.

At the scene of the arrest, the Respondent observed Fitterman search Gialouris from the other side of the vehicle. The Respondent did not specifically see Gialouris thrust his hips out, but he did see Gialouris quickly move his body up against the car. According to the Respondent, the search lasted four to five minutes. At no point did Fitterman pull Gialouris' waistband out and look down his pants.

In a Civilian Complaint Review Board (CCRB) interview (see Court Exhibits 1 & 1a, recording & transcript), while the Respondent might not have said anything about Gialouris making suspicious movements during the search at the desk, the investigator did not pose any questions about that.

Although it was the Respondent's common practice to tell the desk officer when he wanted to strip-search a prisoner, he did not recall if he discussed with the desk officer that night his reasons for wanting to have Gialouris strip-searched. Although Gialouris was searched and frisked both at the scene of arrest and at the station house, Gialouris' movements led the Respondent to believe that a more thorough search was necessary.

On re-direct examination, the Respondent testified that he was aware of suspects that secreted weapons or drugs under their genitals inside their underwear. He once arrested a man who had 40 bags of crack cocaine tied to his penis. A pat-down search would not necessarily

reveal these things. The Respondent stated that it was Department policy that a strip search can be authorized if the arresting officer reasonably suspects that a person is secreting a weapon or contraband. The Respondent generally authorized strip searches in situations where a suspect's actions indicate that something may be hidden. He explained that he "would rather be wrong on a strip search than be wrong on not doing a strip search and something happening." The desk officer, who had the authority to overrule the Respondent's decision to strip-search Gialouris, allowed the search to take place.

Upon questioning by the Court, the Respondent stated that he did not recall Gialouris objecting verbally to the search of his waist area. As part of a strip search, the Respondent would ask a suspect to bend over. He might also ask the subject to spread his buttocks and lift his genitals. He did not recall Gialouris telling him that the money he had was for a computer.

Police Officer Jeffrey Fitterman

Fitterman, a 6-year member of the Department, was assigned to SNEU at the 115 Precinct at the time of trial. He testified that when he stopped Gialouris' car at approximately 10:30 p.m. on October 11, 2006, Gialouris did not have the proper paperwork and acted very fidgety. According to Fitterman, Gialouris was "jumping around in the seat a little bit [and] his hands were all over the place." At his request, Gialouris exited the vehicle. Gialouris then immediately thrust his hips up against the car. Finding this movement unusual and believing that Gialouris might be hiding something, Fitterman grabbed Gialouris and touched his groin area. Gialouris was very hard to control, and Fitterman immediately placed him in handcuffs. Fitterman then attempted to continue frisking Gialouris' groin area, but the suspect made it impossible by thrusting and moving his hips around. Fitterman was concerned that Gialouris had

a weapon in his waistband area, and he feared for his safety and the safety of the other officers at the scene. Within a few minutes of the initial stop, Gialouris was placed in a Department vehicle.

During the ride to the station house, Gialouris was very jumpy and dug his hands into the back of his pants. Fitterman asked him several times to sit still, but Gialouris kept jumping around. Upon entering the station house, Fitterman searched Gialouris in front of the desk. The Department policy that all prisoners be searched at the desk was strictly enforced in the 115 Precinct. During this search, Gialouris again made it impossible for Fitterman to properly search the waistband area for weapons or narcotics. When Fitterman explained this to his supervisor, the Respondent, he ordered that a strip search be conducted. Fitterman stated that if the Respondent had not ordered the strip search, Fitterman would have requested permission to conduct one because he feared that Gialouris presented a dangerous situation. During the course of his career, Fitterman had made between 300 and 350 arrests and participated in approximately a thousand. The majority of his arrests had involved narcotics, but he never before had asked a supervisor to authorize a strip search.

On cross-examination, Fitterman testified that Gialouris was stopped that night for the way that he drove past the Department vehicle and because he had something hanging from the rearview mirror, which was a traffic violation. In addition to Fitterman and the Respondent, Cabrera and Police Officer Diliberto were at the scene of Gialouris' arrest. At the time, Fitterman frisked and searched Gialouris to the best of his ability. Because of Gialouris' hip-thrusting and side-stepping, Fitterman was unable to search the groin area as thoroughly as he would have liked. He admitted that he was able to handcuff Gialouris by himself and quickly place him in the Department vehicle. He felt it was safe to transport Gialouris to the station

house. During the ride, Cabrera sat in the back seat with Gialouris, and Fitterman monitored him from the front seat.

Although Fitterman removed several thousand dollars from Gialouris' pockets, Fitterman was not concerned with the possibility that Gialouris was hiding drugs. He reiterated that his concern was that Gialouris was hiding a weapon. Fitterman stated that he had encountered many suspects who secreted weapons in the groin area, waistband, and "in the back."

Fitterman claimed that he did not have a good view of Gialouris' front and did not observe the bulge of a weapon there. He admitted, however, that he attempted to search both the front and back of his body. During this time, Gialouris was moving around a lot and making it difficult for Fitterman to perform the search. Although Gialouris did not yell or scream, Fitterman did not consider him to be compliant. Fitterman did not recall if any of the other officers indicated concern over Gialouris' lack of compliance.

Police Officer Francis Diliberto, Jr.

Diliberto, a 13-year member of the Department, was assigned to the 115 Precinct. During the course of his career he had made between 400 and 500 arrests.

On October 11, 2006, Diliberto was present at the scene of Gialouris' arrest. He testified that when Fitterman removed Gialouris from the car, Gialouris "kind of pivoted and thrust his private parts and his waistband into the car almost to, like, avoid us seeing what was there or be hiding something that was there. Possibly a weapon."

Diliberto was also present when Gialouris was brought before the desk at the station house. He testified that Gialouris was "very jittery, wouldn't sit still, would kind of move his feet up and down like he was marching, would turn around like an about face from the desk and

was making, like, vertical movements.” Diliberto stated that based on his experience, these movements indicated that Gialouris had a weapon or drugs on him. As a result of the movements, the Respondent authorized a strip search. Had the Respondent not authorized a strip search, Diliberto would have requested one. Diliberto had never before asked a supervisor to authorize a strip search. Diliberto was Gialouris’ arresting officer.

On cross-examination, Diliberto testified that he could not recall how long he was at the scene of arrest. As far as Diliberto could recall, Gialouris thrust his groin against the vehicle just one time. While at the desk, Diliberto searched Gialouris from head to toe, which included feeling around his groin area. Gialouris, who was handcuffed at the time, would not keep still. There were other officers in the area had Diliberto required assistance. Diliberto removed money and personal property from Gialouris’ pockets. When he reached into the pockets, he did not feel anything that resembled a weapon. Diliberto described his search of Gialouris as thorough. He explained, though, that “a thorough search doesn’t mean you are always going to get everything that someone has on them.” Despite the fact that he had already searched Gialouris’ groin and waistband areas, Diliberto felt that Gialouris could have been hiding a small gun, knife, or drugs.

There was no indication that Gialouris was on drugs or violent. According to Diliberto, however, “something just didn’t seem right . . . to turn around and fidgety movements made our antennae go up and lead us to believe he had something on him other than what we had found.” According to Diliberto, the Respondent based his order to strip-search Gialouris on a combination of the arrestee’s movements at the arrest scene and at the station house. As part of the search, Gialouris was asked to turn around, bend over, and spread his buttocks. All of the searches of Gialouris that day had negative results.

On re-direct examination, Diliberto testified that as a result of Gialouris' actions, he was not satisfied with the thoroughness of the search conducted at the desk. The other officers involved in the incident were also uneasy about the thoroughness of the search. Gialouris was stopped after being observed driving across a double yellow line in an erratic manner. He had approximately \$3,000 on him. Diliberto asserted that there was a lot of drug activity and violence in the 115 Precinct.

On re-cross-examination, Diliberto testified that he did not know until the search at the desk that Gialouris was carrying a large quantity of money. Gialouris did not comply with Diliberto's orders to stand still during that search. Diliberto did not recall Gialouris screaming or attempting to reach inside his pants.

Upon questioning by the Court, Diliberto testified that the Respondent was at the desk while Diliberto was searching Gialouris. At the scene of the arrest, Gialouris thrust himself at the car as he was being taken out of the vehicle. The thrust did not take place while Gialouris was being frisked. There was no indication that Gialouris was intoxicated.

FINDINGS & ANALYSIS

The Respondent is charged with authorizing an improper strip search. He was the supervisor of a team that made a car stop of the complaining witness, Michael Gialouris, a student at LaGuardia Community College. On the evening of October 11, 2006, at approximately 10:00 p.m., Gialouris was pulled over for unsafe operation, including cutting off the team's vehicle and driving into oncoming traffic. When questioned, Gialouris did not have his driver's license, insurance and registration. Gialouris was removed from his vehicle and placed under arrest.

Fitterman, one of the responding officers, approached the driver's side of Gialouris' vehicle. Fitterman observed that Gialouris was "fidgety" when asked to produce his paperwork. When ordered out of the car, Gialouris immediately thrust his hips against it. Gialouris was also "very jumpy" when placed into the back of the police vehicle after his arrest. He appeared to be putting his hands in the back of his pants.

The Respondent confirmed that Gialouris lunged his body toward the car when Fitterman tried to search his waistband area. Diliberto, the arresting officer, testified that Gialouris thrust his body toward the car when he was first removed from it.

The Respondent testified that Gialouris also moved around when Fitterman tried searching him at the desk in the 115 Precinct. He would not allow Fitterman to touch him, moving around each time. Fitterman corroborated this testimony and opined that he was unable to perform what he considered to be a thorough search, either at the scene or the desk.

Diliberto testified that he performed a search of Gialouris at the desk. (The Court notes that the complaining witness was searched on the street by Fitterman, then transported to the station house by Fitterman and Cabrera; at some point, Diliberto, who was at the stop, was assigned as arresting officer. Under Patrol Guide § 208-05 [1][B][1], the arresting officer is required to search a prisoner when brought before the desk.)

After the search at the desk was attempted, the Respondent authorized the strip search. This took place in an empty cell, not the regular holding cells, which could not be seen from the desk area. There was no allegation that the strip search itself was performed inappropriately.

Gialouris testified that he only moved around during the search of his waistband on the street, when Fitterman pulled the waistband of both his pants and underwear, allowing Cabrera, a female officer, to see inside. Cabrera did not testify. Neither Fitterman nor any of the other

officers are charged with allowing the genitals or buttocks of Gialouris to be exposed on the street.

Gialouris had approximately \$3,000 in cash in his possession when arrested. He testified that part of this was a tuition refund after he received a Pell grant, and part was his own money. The money was not vouchered; it was returned to Gialouris' mother at the precinct when she came to pick up the car. There is no indication that the Gialourises made a complaint about any missing funds. The Respondent found the fact that Gialouris was carrying \$3,000 in cash to be "significant."

There was no evidence that the Respondent had anything to gain by authorizing a strip search. While a strip search is an invasive and unpleasant experience for almost everyone, it is also true that it is no more pleasant for the officers that conduct it. Nothing at trial indicated that the officers wanted to conduct a strip search for any reason other than that they believed Gialouris might be concealing weapons or contraband underneath his clothes.

Patrol Guide § 208-05 (1)(C)(1) states that a strip search is permitted only where there is reasonable suspicion that the individual is concealing weapons, contraband or evidence on his person or beneath his clothing, in a way that is undetectable by a standard search. Only a supervisor may authorize a strip search. The search must be conducted by a member of the same sex as the arrestee, "in a secure area in utmost privacy and with no other arrestee present." The body of the arrestee should not be touched, except for the hair (i.e., if something could be hidden in the hair). See Patrol Guide § 208-05 (1)(C)(2).

The reasonable-suspicion requirement is derived from the 4th Amendment to the United States Constitution. See Huck v. City of Newburgh, 275 A.D.2d 343 (2d Dept. 2000). In the strip-search context, reasonable suspicion consists of a level of information which would lead an

“ordinarily prudent and cautious” person, see People v. Cantor, 36 N.Y.2d 106, 112-13 (1975), under the circumstances, to believe that items are concealed. See People v. Roque, 99 N.Y.2d 50, 54 (2002).

The question of reasonable suspicion is an objective one. People v. Kelley, 306 A.D.2d 699, 700 (3d Dept. 2003). There are many relevant factors, but they include excessive nervousness or unusual conduct. Kelley, 206 A.D.2d at 700; cf. People v. Walker, 27 A.D.3d 899, 901 (3d Dept. 2006) (strip search was appropriate where suspect was fidgety and nervous, sweating profusely, possessed switchblade, urinated in his clothes when he saw the police, and came to the location to sell drugs but no drugs were found during pat-down).

Here, Gialouris became fidgety when the officers attempted to pat down the area around his genitals. Gialouris testified that this was when Fitterman tried to look inside his pants, allowing Cabrera, the female officer, to see inside. The officers testified that he was much more fidgety throughout. Certainly, Gialouris did not want that area of his body to be searched. This is understandable, but that conduct, combined with the \$3,000 in cash found in Gialouris’ possession, were specific and objective factors to support the view of an “ordinarily prudent and cautious” person, under the circumstances, that he was concealing a weapon or drugs.

Thus, the Department failed to prove by a preponderance of the evidence that the strip search was unauthorized. Accordingly, the Respondent is found Not Guilty of the sole specification, which charged him with wrongfully authorizing a strip search.

APPROVED
APR 18 2011

RAYMOND W. KELLY
POLICE COMMISSIONER

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner – Trials